No. 09-1389

In the Supreme Court of the United States

HARBER CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an ancillary proceeding under 21 U.S.C. 853(n), initiated by third-party claimants seeking to prevent criminal forfeiture of property in which they claim an interest, is a "civil proceeding to forfeit property" for purposes of the fee-shifting provision of the Civil Asset Forfeiture Reform Act, 28 U.S.C. 2465(b).

2. Whether the United States is immune from an award of interest on seized funds where there was no statutory waiver of sovereign immunity permitting the award of interest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-17) is not published in the Federal Reporter but is reprinted at 354 Fed. Appx. 676. The opinion of the district court (Pet. App. 20-31) denying petitioners' motion for attorneys' fees and interest is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2009 (Pet. App. 1-2). A petition for rehearing was denied on February 9, 2010 (Pet. App. 32-33). The petition for a writ of certiorari was filed on May 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After several bank accounts were included in a preliminary order of forfeiture in a criminal prosecution, petitioners initiated a proceeding under 21 U.S.C. 853(f) asserting their interest in the accounts. After the district court granted summary judgment in petitioners' favor, they sought attorneys' fees, costs, and interest arising from that proceeding. The United States District Court for the District of New Jersey denied that motion, Pet. App. 18-31, and the court of appeals affirmed, *id.* at 3-17.

1. On June 27, 2002, the United States seized more than $21 million held in 39 bank accounts at Merchants Bank in connection with the arrest of a bank employee, Maria Nolasco. Pet. App. 5; Gov't C.A. Br. 4. Nolasco eventually pleaded guilty to one count of operating a money-transmitting business without a license, in violation of 18 U.S.C. 1960, and four counts of filing false tax returns, in violation of 26 U.S.C. 7201. Pet. App. 5. In her plea agreement, Nolasco agreed to forfeit any interest in the seized accounts, and the government initiated criminal forfeiture proceedings against her under 18 U.S.C. 982(a)(1). Gov't C.A. Br. 4. In December 2004, the district court entered a preliminary order of forfeiture. Pet. App. 5.

2. Petitioners and other claimants filed petitions under 21 U.S.C. 853(n), which allows "[a]ny person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States," to seek "a hearing to adjudicate the validity of his alleged interest." The district court ruled that petitioners' interests in the property were superior to Nolasco's at the time of the offenses, and it therefore amen-

ded the preliminary order of forfeiture to exclude the funds claimed by petitioners. Pet. App. 4-5.

The government then transferred the funds to the New York County District Attorney's Office, which had initiated civil forfeiture proceedings against the funds. Gov't C.A. Br. 5. A New York grand jury charged the corporate-entity petitioners with violations of New York law. *Ibid.*; *Morgenthau* v. *Avion Res. Ltd.*, 898 N.E.2d 929, 930 (N.Y. 2008).

Authorities in Brazil also brought criminal charges against individuals associated with the seized accounts, including the natural-person petitioners. Gov't C.A. Br. 3, 6. Based on those charges, the United States District Court for the District of Columbia issued an order freezing the funds under 28 U.S.C. 2467(d)(3)(B)(ii) and 18 U.S.C. 983(j)(1) as potentially forfeitable to the Brazilian government. Gov't C.A. Br. 6. Pursuant to that order, the New York authorities transferred the funds to the United States Department of Justice. *Ibid.*; Pet. App. 6 n.2; *Morgenthau*, 898 N.E.2d at 932 n.8. Following the transfer, the corporate-entity petitioners pleaded guilty in New York state court to banking law violations. Gov't C.A. Br. 6.

3. Although all of the funds in question have either been forfeited by petitioners or remain in the custody of the government pending the outcome of litigation in the District of Columbia and Brazil, petitioners moved in the United States District Court for the District of New Jersey for an award of attorneys' fees, costs, and interest under the fee-shifting provisions of 28 U.S.C. 2465(b). Pet. App. 6 & n.2. That statute allows a court to make such an award to a claimant who has "substantially prevail[ed]" "in any civil proceeding to forfeit property." In the alternative, petitioners contended that, even if Sec-

tion 2465(b) did not authorize recovery, the district court should order the government to disgorge any interest realized on the seized money. *Id.* at 6.

The district court denied the motion. Pet. App. 20-31. The court concluded that a proceeding under Section 853(n), in which a third party asserts its interest in property subject to criminal forfeiture, is not a "civil proceeding to forfeit property" within the meaning of Section 2465(b). *Id.* at 27. The court noted that the Section 853(n) petitions in this case "did not purport to forfeit property" but instead "served as an attempt to intervene in and block the Government's attempt to seize the property in the criminal forfeiture proceeding it initiated." *Ibid.* The district court also rejected petitioners' disgorgement claim on the ground that sovereign immunity bars an award of interest against the government "unless the Government has waived its sovereign immunity from such an award by contract or statute." *Id.* at 29.

4. The court of appeals affirmed. Pet. App. 3-17. The court rejected petitioners' contention that an ancillary proceeding under Section 853(n) is a "civil proceeding to forfeit property" for purposes of Section 2465(b). The court held that, while a Section 853(n) ancillary proceeding is a "civil proceeding" separate from the criminal prosecution in which the forfeitability of the property is established, it is not a proceeding "to forfeit property" because "a Section 853(n) proceeding cannot result in the forfeiture of a claimant's property." *Id.* at 10-11. The court observed that, because "[f]orfeitability has already been proven" in the separate criminal proceeding, "[o]wnership is the only relevant issue in a Section 853(n) ancillary proceeding." *Id.* at 12. Because the Section 853(n) ancillary proceedings are limited to "ex-

clud[ing] property from forfeiture" based on the petitioner's possession of superior title than the defendant's, such proceedings "do not 'forfeit property' as required by Section 2465(b)." *Ibid.* The court noted that the only other court of appeals to decide the issue had reached the same conclusion. *Id.* at 14 (citing *United States* v. *Moser*, 586 F.3d 1089 (8th Cir. 2009), cert. denied, No. 09-1230 (May 17, 2010).

Relying on principles of sovereign immunity, the court of appeals also rejected petitioners' alternative contention that, even in the absence of statutory authorization, the United States should be required to "disgorge" the interest earned on the funds. Pet. App. 14-16. The court explained that, under the "no-interest rule" of *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), the United States is immune from an award of interest absent "express congressional consent to the award of interest separate from a general waiver of immunity to suit." Pet. App. 14 (quoting *Shaw*, 478 U.S. at 314). The court acknowledged that a minority of circuits have allowed awards of interest against the government in the context of seized funds, on the theory that interest earned has become part of the property that should be returned to the claimant. *Id.* at 15. But the court adhered to "the majority approach" barring interest awards, because, as the court explained, the "minority view * * * is at odds with *Shaw*." *Id.* at 16. The court of appeals noted that the minority's characterization of an interest award as "disgorgement" is inconsistent with this Court's statement in *Shaw* that "the force of the no-interest rule cannot be avoided simply by devising a new name" for an award of interest. *Ibid.* (quoting *Shaw*, 478 U.S. at 319).

ARGUMENT

Petitioners assert (Pet. 16-31) that they are entitled to attorneys' fees, costs, and interest under 28 U.S.C. 2465(b) as substantially prevailing parties in a "civil proceeding to forfeit property." In the alternative (Pet. 11-16), they argue that they are entitled to "disgorgement" of interest even in the absence of specific statutory authorization. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court. Although there is some disagreement among the circuits on whether sovereign immunity bars recovery of interest on seized money, this case would be a poor vehicle for resolving it. Further review is not warranted.

1. Petitioners renew their contention (Pet. 16 31) that an ancillary proceeding under 21 U.S.C. 853(n) is a "civil proceeding to forfeit property" for purposes of the fee-shifting provisions of 28 U.S.C. 2465(b). The court of appeals correctly rejected that argument, and petitioners do not contend that its decision conflicts with any decision of this Court or any other court of appeals.

Section 2465(b) provides for recovery of attorney's fees and interest (if the case involves currency) for a claimant who "substantially prevails" in "any civil proceeding to forfeit property under any provision of Federal law." As the court of appeals explained, an ancillary proceeding under Section 853(n) is not a "civil proceeding to forfeit property." Pet. App. 9-14. In contrast with civil, *in rem* forfeiture proceedings in which all interested parties may participate, criminal forfeiture is an *in personam* proceeding against a defendant in which only the government and the defendant may participate. See 21 U.S.C. 853(k). Section 853(n), however, provides that a third party "asserting a legal interest in property

which has been ordered forfeited to the United States" in a criminal proceeding may "petition the court for a hearing to adjudicate the validity of his alleged interest in the property." To prevail in the ancillary proceeding, the third party need only establish that he, not the defendant, was the owner of the property at the time it became subject to forfeiture, or that he was a bona fide purchaser without reason to believe the property was subject to forfeiture. 21 U.S.C. 853(n)(6)(A) and (B). If the claimant prevails, the court must amend the order of forfeiture to exclude the claimant's property. 21 U.S.C. 853(n)(6).

An ancillary proceeding under Section 853(n) is not a proceeding "to forfeit property" because the objective of the party initiating the proceeding is not to forfeit property, and the proceeding cannot result in forfeiture of any assets that have not already been determined to be forfeitable. Forfeitability of the property is not at issue in the ancillary proceeding—the only issue is ownership. See *United States* v. *Andrews*, 530 F.3d 1232, 1236-1237 (10th Cir. 2008) ("[A] third party has no right to challenge the preliminary order's finding of forfeitability; rather, the third party is given an opportunity during the ancillary proceeding to assert any ownership interest that would require amendment of the order."). Accordingly, the court of appeals correctly viewed the ancillary proceeding as essentially a quiet-title action, in which the court determines the rightful owner of property that is otherwise forfeitable. Pet. App. 11-12; see also *United States* v. *McHan*, 345 F.3d 262, 275-276 (4th Cir. 2003). And the court correctly concluded that such a proceeding is not a proceeding "to forfeit property" for purposes of Section 2465(b)—its purpose is not to establish the government's right to forfeit the property but

rather to determine whether property belongs to the claimant rather than to the defendant, in order to exclude it from the forfeiture order. Pet. App. 11-12.

That conclusion accords with that of the only other court of appeals to have considered the issue. See *United States* v. *Moser*, 586 F.3d 1089, 1095 (8th Cir. 2009), cert. denied, No. 09-1230 (May 17, 2010). In that case, the Eighth Circuit held that a prevailing claimant in a Section 853(n) ancillary proceeding could not recover attorney's fees under Section 2465(b). *Id.* at 1095-1096. The court reasoned that, because the ancillary proceeding is limited to "claims of ownership and priorities of interest vis-a-vis the government and the petitioners," it is uncertain whether the proceeding qualifies as "a civil proceeding to forfeit property." *Ibid.* In light of that ambiguity, the court concluded that Congress did not "clearly and unequivocally waive[] sovereign immunity in this situation." *Id.* at 1096. This Court recently denied review in *Moser*, and there is no reason for a different outcome here.

2. Petitioners also argue (Pet. 11-16) that, even in the absence of a statutory waiver of sovereign immunity, the district court had authority to order "disgorgement" of interest on their seized funds. That is incorrect. The United States government is immune from suit unless it has expressly waived its sovereign immunity. *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). Any purported waiver of sovereign immunity is "strictly construed" in favor of the sovereign, *ibid.*, and there is "an added gloss of strictness" when a claimant seeks an award of interest against the government. *Library of Congress* v. *Shaw*, 478 U.S. 310, 319 (1986). This Court has long recognized the "no-interest rule," according to which the United States is immune from an award of interest absent "ex-

press congressional consent to the award of interest separate from a general waiver of immunity to suit." *Id.* at 314. Moreover, *Shaw* makes clear that "[t]he force of the no-interest rule cannot be avoided simply by devising a new name" for the interest award. *Id.* at 321. Thus, in *Shaw*, the Court rejected an award of interest that was characterized as an essential part of a "reasonable attorney's fee" in litigation with lengthy delays, explaining that "[t]he character of interest cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." *Ibid.* The Court also emphasized that "[c]ourts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *Ibid.*

The "no-interest rule" of *Shaw* forecloses petitioners' claim in this case. As the court of appeals noted, petitioners' requested relief—an order compelling the United States to disgorge the interest on the seized funds—was an "interest award" within the meaning of *Shaw*, from which the United States is immune absent an express congressional waiver. Pet. App. 15-16. That judgment is in harmony with the majority of courts of appeals that have addressed the issue. See *Larson* v. *United States*, 274 F.3d 643, 647-648 (1st Cir. 2001) (per curiam) (the United States is immune from an award of interest when the government returns money it has previously seized); *Ikelionwu* v. *United States*, 150 F.3d 233, 239 (2d Cir. 1998) (same); *United States* v. *$7,990.00 in U.S. Currency*, 170 F.3d 843, 845-846 (8th Cir.) (same), cert. dismissed 528 U.S. 1041 (1999); *United States* v. *$30,006.25 in U.S. Currency*, 236 F.3d 610, 615 (10th Cir. 2000) (same), cert. denied, 534 U.S. 856 (2001).

As petitioners note (Pet. 11-13), two courts of appeals have held in civil asset-forfeiture cases that, when the government returns money it has previously seized, courts may order the government to disgorge the returned funds with interest. See *United States* v. *$277,000 in U.S. Currency*, 69 F.3d 1491, 1497-1498 (9th Cir. 1995) (*$277,000*); *United States* v. *$515,060.42 in U.S. Currency*, 152 F.3d 491, 504 (6th Cir. 1998) (*$515,060.42*); see also *United States* v. *1461 West 42nd Street*, 251 F.3d 1329, 1338 (11th Cir. 2001) (noting in dictum that the government "may be liable for prejudgment interest" and citing *$515,060.42*, but holding that sovereign immunity barred any award because the government did not earn interest on the seized properties). But this case is a poor vehicle for reviewing the disagreement among the circuits on this issue, because it is not clear that petitioners would be entitled to recover interest even under the rule adopted by the Sixth and Ninth Circuits.

The rationale of that rule is that the interest earned on seized cash "becomes part of the *res*," and therefore when the government returns the *res*, it must also disgorge with the *res* the interest that has become an integral part of it. *$515,060.42*, 152 F.3d at 505 (quoting *$277,000*, 69 F.3d at 1496); see also *id.* at 504 ("[W]e do not view the award of interest in this case as the typical award of pre-judgment interest which cannot be recovered absent an express waiver of sovereign immunity; rather, we view this award of interest as an aspect of the seized *res*."). In this case, however, it is doubtful whether a rule requiring a return of interest together with the *res* with which it has merged would benefit petitioners. Petitioners have not recovered the *res* and, accordingly, their claim would at best be premature. Moreover, in

the event that the ongoing litigation results in forfeiture of the *res* to the government of Brazil, petitioners should not be able to recover interest based on an argument that the interest had "become part of the *res*, to be returned with the *res* to the claimant." *$277,000*, 69 F.3d at 1496.*

In addition, as petitioners note (Pet. 14-16), the Sixth and Ninth Circuit rule that petitioners invoke rests on "equitable principles." But in light of the corporate-entity petitioners' guilty pleas in New York and the pending prosecutions of the individual petitioners for crimes in Brazil related to the seized accounts, it is uncertain whether the balance of equities would ultimately support an interest award in their favor.

In any event, the importance of this issue has been significantly diminished by the passage of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202, 18 U.S.C. 981 *et seq.* Before CAFRA, Section 2465 "made no provision for, or reference to, the recovery of pre-judgment interest." *Lar-*

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* The Sixth Circuit has suggested in an unpublished decision that, while it is generally true that "interest accrued on a returnable *res* * * * would simply follow the *res*," it is not strictly necessary that the *res* ultimately be returned in order to award interest, because "the government should not reap benefits from the money of its citizens * * * whether the *res* is forfeitable under another theory or not." *United States* v. *Ford*, 64 Fed. Appx. 976, 985 (2003). That statement was dictum, however, because the court held that "no interest award could properly [be] made * * * absent a determination that [the claimant] was indeed the proper owner of the funds," and that, where such a determination had not been made, an award of interest was premature. *Ibid.* Here, if the funds at issue are ultimately found to have been forfeitable to the Brazilian government as of a time preceding their seizure by the United States, an award of interest to petitioners would be improper even under the reasoning of *Ford*.

son, 274 F.3d at 645. With the passage of CAFRA, Congress amended the statute to provide for an award of pre-judgment interest to claimants who substantially prevail in civil asset-forfeiture proceedings involving currency. 28 U.S.C. 2465(b) (2000). While CAFRA does not provide for an interest award for prevailing claimants in all circumstances, see pp. 6-8, *supra*; *Ohel Rachel Synagogue* v. *United States*, 482 F.3d 1058, 1062-1063 (9th Cir. 2007) (noting that recovery under 2465(b) is not permitted in criminal or administrative forfeiture proceedings), CAFRA's provision for recovery of interest in ordinary civil-asset forfeiture cases, such as those underlying *$277,000* and *$515,060.42*, has greatly reduced the practical significance of the circuit conflict. See *Smith* v. *Principi*, 281 F.3d 1384, 1388 n.2 (Fed. Cir. 2002) ("The circuit split is of diminishing significance" because of CAFRA.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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